Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Navajo Nation Oil & Gas Company

File: B-270723

Date: April 15, 1996

Thomas M. Barba, Esq., and David A. Stein, Esq., Steptoe & Johnson, for the protester.
Ron R. Hutchinson, Esq., Doyle & Bachman, for Barrett Refining Corporation; Joseph P. Hornyak, Esq., and Debra A. McGuire, Esq., Sonnenschein, Nath & Rosenthal, for Navajo Refining Company; James J. McCullough, Esq., and Anne B. Perry, Esq., Fried, Frank, Harris, Shriver & Jacobson, for Refinery Holding Company, L.P., intervenors.
Howard M. Kaufer, Esq., Defense Logistics Agency, for the agency.
John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that the Defense Fuel Supply Center improperly excluded from a solicitation issued in fiscal year 1996 a provision giving small disadvantaged preference to Indian Tribal corporations furnishing fuel from small business manufacturers/refiners is denied, where the provision was contained in the Department of Defense's (DOD) appropriations act for fiscal year 1995, DOD Appropriations Act, 1995, § 8012, Pub. L. No. 103-355, 108 Stat. 2599, 2619 (1994), was non-permanent in nature, and no similar provision is contained in the DOD Appropriations Act, 1996, Pub. L. No. 104-61, 109 Stat. 636 (1995).

DECISION

Navajo Nation Oil & Gas Company (NNOGC) protests the terms of request for proposals (RFP) No. SPO600-96-R-0030 (RFP-0030), issued by the Defense Fuel Supply Center (DFSC), Defense Logistics Agency, for fuel. NNOGC contends that a provision of the RFP pertaining to the eligibility of small disadvantaged business (SDB) concerns for an evaluation preference is inconsistent with section 8012 of the Department of Defense (DOD) Appropriations Act, 1995, Pub. L. No. 103-355, 108 Stat. 2599, 2619 (1994).

We deny the protest.

On March 31, 1995, DFSC issued RFP No. SPO600-95-R-0161 (RFP-0161), which provided for multiple awards of fixed-price indefinite quantity contracts with

economic price adjustments for the supply of approximately 1.6 billion gallons of fuel for nearly 200 using activities.[1] The solicitation contained an evaluation preference for SDB concerns applicable to certain items set forth in the solicitation.

The RFP also included a clause that set forth certain special standards of responsibility applicable to non-refiner/non-manufacturer offerors. NNOGC, an Indian Tribal Corporation owned and controlled by the Navajo Nation (a federally recognized Native American tribe), filed a protest with our Office on May 8, 1995, contending, among other things, that the agency had no reasonable basis for any of this clause's special standards of responsibility, and that the clause was thus unduly restrictive of competition.

In Navajo Nation Oil & Gas Co., B-261329, Sept. 14, 1995, 95-2 CPD ¶ 133, we sustained NNOGC's protest because the record provided no basis to conclude that the protested clause was reasonably related to the agency's minimum needs. We recommended that the agency determine from the protester which of the line items the protester was interested in competing for under an amended solicitation, refrain from ordering under the existing contracts for these line items any more fuel than was required, resolicit for these line items without the protested clause and in a manner consistent with our decision, and terminate the contract(s) if the current contractor(s) is/are not the successful offeror(s) under the resolicitation.[2]

In response to our recommendation, DFSC contacted NNOGC to determine which line items NNOGC was interested in and, on November 24, issued RFP-0030 (which did not include the clause that was the subject of the prior protest) for a total fuel requirement of more than 165 million gallons for 12 using activities.

NNOGC protests the inclusion of a provision in RFP-0030, which states that "[SDB] concerns who are not manufacturers of the product offered are reminded that their source refinery must be a [SDB] concern in order for their offer to be eligible" for an SDB concern evaluation preference.[3] NNOGC asserts that the inclusion of this

---

[1]RFP-0161, as well as RFP-0030, are part of DFSC's Bulk Fuels program, wherein DFSC procures large quantities of fuel for use at numerous Department of Defense installations.

[2]On August 25, 1995, the agency informed our Office that it was proceeding with contract award and performance based upon a written determination that urgent and compelling circumstances will not permit waiting for our decision. See 31 U.S.C. § 3553(d)(2) (1988).

[3]The standard DOD clause requires SDB concerns to provide a product

(continued...)

provision in the RFP is inconsistent with section 8012 of the 1995 Department of Defense Appropriations Act, which states:

> "Notwithstanding any other provision of law, a qualified Indian Tribal corporation or Alaska Native Corporation furnishing the product of a responsible small business concern shall not be denied the opportunity to compete for and be awarded a procurement contract pursuant to section 2323 of title 10, United States Code, solely because the Indian Tribal corporation or Alaska Native Corporation is not the actual manufacturer or processor of the product to be supplied under the contract."

NNOGC asserts that although section 8012 provides that an Indian Tribal corporation, such as NNOGC, may be considered an SDB concern eligible for an evaluation preference if it supplies fuel refined by a small business, the protested provision improperly restricts the application of the SDB preference to only those SDB concerns who are supplying fuel obtained from SDB manufacturers/refiners.

We agree that the protested provision is inconsistent with section 8012. However, neither this nor any similar provision is included in the DOD Appropriations Act, 1996, Pub. L. No. 104-61, 109 Stat. 636 (1995). As explained below, section 8012, as part of the DOD appropriations act for fiscal year 1995, expired on September 30, 1995, and is therefore not applicable to this RFP issued during fiscal year 1996.

There is a presumption that any provision in an annual appropriation act is effective only for the covered fiscal year. 31 U.S.C. § 1301(c) (1994); 65 Comp. Gen. 588 (1986). This is so because appropriation acts are by their nature non-permanent legislation. 65 Comp. Gen 588. Thus, unless otherwise specified, the provisions of an annual appropriation act for a given fiscal year expire at the end of that fiscal year. A provision contained in an appropriation act is not permanent legislation unless the language or nature of the provision makes it clear that such was the intent of Congress, 62 Comp. Gen. 54 (1982); 10 Comp. Gen. 120 (1930), or, under certain circumstances, where the provision is of a general nature, bearing no relation to the object of the appropriation. See 26 Comp. Gen. 354 (1946).

---

[3](...continued)
manufactured by SDB concerns in order to qualify for the SDB preference. Defense Federal Acquisition Regulation Supplement §§ 252.219-7001(f)(2); 252.219-7006(d)(2).

Permanency is indicated most clearly when the provision in question includes "words of futurity," such as "hereafter" or "after the date of approval of this act." 65 Comp. Gen. 588. Section 8012 includes no such words of futurity. The language used in section 8012, "notwithstanding any other provision of law," is language of present exclusivity, and not words of futurity. B-208705, Sept. 14, 1982.

Additionally, section 8012 cannot properly be considered as general in nature, bearing no relation to the object of the appropriation act of which it is a part. This is so because in a statute that otherwise provides funding for DOD, section 8012 requires that DOD consider certain entities under certain conditions to be SDB concerns, effectively rendering the concerns eligible for an evaluation preference. See B-208705, supra.

We also note that the language of section 8012 appeared for the first time in, and is identical to that of, section 8051 of the DOD Appropriations Act, 1994, Pub. L. No. 103-139, 107 Stat. 1418, 1451 (1993). The fact that the provision was repeated in the appropriation act for 1995 without change after having been enacted in the 1994 appropriation act implies that the provision was not considered nor intended by Congress to be permanent legislation. 5 Comp. Gen 810 (1926); see 32 Comp. Gen 11 (1952); 10 Comp. Gen. 120.

In sum, section 8012 cannot properly be construed as permanent legislation, and the requirements of the provision thus expired on September 30, 1995--at the end of fiscal year 1995.[4] Inasmuch as section 8012 has expired, it is not applicable to RFP-0030 because this RFP was issued, and the contract awards that may be made thereunder will occur, during fiscal year 1996, and will be funded from the Defense Business Operations Fund (DBOF) (a "working capital" or "revolving" fund maintained in the United States Treasury). See 10 U.S.C. § 2208 (1994).[5]

The protester nevertheless argues that section 8012 should be considered applicable to RFP-0030 under the replacement contract doctrine. The replacement contract doctrine is meant to facilitate contract administration by allowing funds obligated

---

[4]There is no legislative history which would support the view that section 8012 was meant as permanent legislation.

[5]As explained by DFSC, it obligates funds from the DBOF as it awards fuel contracts, such as those under this RFP. The using activities reimburse the fund from their appropriations after the contracts are in place and the activities have ordered fuel for delivery and been billed by DFSC. According to DFSC, because any contracts under RFP-0030 will be awarded in fiscal year 1996, DFSC will obligate the funds against the DBOF, and using activities will order fuel and obligate funds for reimbursement of the DBOF, in fiscal year 1996.

from annual appropriations for a particular contract to remain available should a replacement contract be required because, for example, the initial contract is terminated for default because of poor performance or is terminated for convenience because a court or other competent authority determines that a contract was improperly awarded. 68 Comp. Gen. 158 (1988). Absent the replacement contract doctrine, an agency which terminates a contract would be required to deobligate the prior year funds which support the terminated contract, and reprogram and obligate current year funds, even though the particular expenditure was budgeted for the prior year. 60 Comp. Gen. 591 (1981).

As explained by DFSC, should contracts be awarded under RFP-0030, DFSC will obligate the necessary funds against the DBOF, and will deobligate the funds supporting any contracts awarded under RFP-0161 that will be terminated.[6] Consequently, contracts awarded under RFP-0030 will not be "replacement contracts" under the replacement contract doctrine in the obligational sense simply because the funds to support those contracts will not be from the specific obligations supporting the contracts awarded under RFP-0161. In any event, since the replacement contract doctrine simply provides a mechanism to allow agencies to administer their contract effectively when there is a reason to terminate a contract, its use is solely at the government's discretion; we are aware of no law or regulation that requires an agency to avail itself of the doctrine.

NNOGC nevertheless argues that DFSC, by not implementing section 8012 in RFP-0030, has "frustrated" Congress' goal in enacting that section, and that DFSC's actions here constitute "a cynical attempt to profit from its own improper conduct and delaying tactics." These contentions are without merit. As explained above, section 8012, as part of the 1995 DOD Appropriations Act, was applicable to fiscal year 1995, and expired at the end of fiscal year 1995, and neither it, nor any similar language, was included in the 1996 DOD Appropriations Act. Thus, we see no basis to conclude that any purpose of Congress has been frustrated. Nor does the record support NNOGC's assertions that DFSC's actions were cynically dilatory. We previously sustained NNOGC's protest that a clause setting forth special standards of responsibility was improperly included in RFP-0161, not that any violation of section 8012 occurred, and DFSC has not included the protested clause in RFP-0030.

NNOGC also protests that the agency did not fully comply with our recommendation because it failed to include in RFP-0030 certain items from RFP-

---

[6]Because contracts awarded by DFSC for fuel are funded by the DBOF, which is a working capital or revolving fund, and not an annual appropriation, the administrative problems necessitating the replacement contract doctrine do not exist.

0161 in which the protester expressed interest. Because the protester concedes that without the application of section 8012 to RFP-0030 there is "no prospect of an award to NNOGC," we no longer consider NNOGC to be an interested party eligible to challenge the agency's determination not to resolicit the items in question. Bid Protest Regulations, section 21.0(a), 60 Fed. Reg. 40,737, 40,739 (Aug. 10, 1995) (to be codified at 4 C.F.R. § 21.0(a)); Space Commerce Corp., 68 Comp. Gen. 646 (1989), 89-2 CPD ¶ 186.

Finally, in view of NNOGC's representation that it has no prospect for award under RFP-0030, we modify the recommendation in our prior decision Navajo Nation Oil & Gas Co., supra, to provide that the agency need not resolicit the items in which the protester expressed interest.

The protest is denied.

Comptroller General
of the United States

f:\projects\pl\270723.wp5